SJC-13146

COMMONWEALTH vs. NICHOLAS SANTANA.

Middlesex. December 6, 2021. - February 25, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Practice, Criminal, Probation, Revocation of probation, Waiver, Stipulation, Sentence, Appeal. Notice, Timeliness. Waiver. Due Process of Law, Probation revocation, Hearing.

Indictments found and returned in the Superior Court Department on August 1, 2013.

A proceeding for revocation of probation was heard by Heidi E. Brieger, J., and a motion to revise and revoke the defendant's sentence was also heard by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Estera Halpern for the defendant.
Howard P. Blatchford, Jr., Assistant District Attorney, for the Commonwealth.

CYPHER, J. On September 11, 2014, the probationer, Nicholas Santana, entered pleas of guilty in the Superior Court in Middlesex County to an indictment charging him with carrying

a firearm without a license, in violation of G. L. c. 269, § 10 (a) (count 1), and to an indictment charging him with carrying a loaded firearm, in violation of G. L. c. 269, § 10 (n) (count 3).[1] In June 2017, while the probationer was serving a suspended sentence, he stipulated to violations of the conditions of his probation, waived a probation violation hearing, and was resentenced with additional conditions of probation. The probationer filed a motion to revise and revoke his sentence, which was denied. The probationer appeals from the denial of his motion to revise and revoke his sentence of probation as well as from the sentence of probation itself.

The probationer claims that the denial of his motion to revise and revoke his sentence was an abuse of discretion. He argues that the motion judge failed to consider the effect of a "forthwith" sentence, see G. L. c. 279, § 27 (§ 27), imposed in a separate case, on his sentence of probation in this case. For the reasons that follow, we affirm the order denying the probationer's motion.

We also conclude that the probationer's appeal from his sentence of probation is not properly before us. Nevertheless, because the arguments have been briefed fully and present issues

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[1] The Commonwealth filed a nolle prosequi on an indictment charging the defendant with possession of ammunition without a firearm identification card, in violation of G. L. c. 269, § 10 (h).

of importance in the conduct of surrender hearings, we exercise our discretion to reach the issues raised. In particular, we take this opportunity to adopt the analysis and conclusion of the Appeals Court in Commonwealth v. Sayyid, 86 Mass. App. Ct. 479, 480 (2014), and hold that a probationer's agreement to waive a probation violation hearing, including by stipulating to probation violations, must be knowing and voluntary and that the validity of such a waiver should be evaluated in light of the totality of the circumstances. We conclude that the probationer's stipulation and waiver were knowing and voluntary, and we therefore affirm his sentence.[2]

The probationer also challenges a specific condition of his probation as not being reasonably related to the goals of sentencing. While this argument would be waived even if the appeal from the sentence properly were before us, we reach the issue because of its importance and because it presents the opportunity to clarify our case law in this area. We conclude that the challenged condition was proper.

Background. Following the probationer's original pleas of guilty, the judge imposed a sentence on count 1 of two and one-half years in a house of correction, with eighteen months to be

[2] We also reject the probationer's related argument that his sentence of probation must be vacated because no evidence of a violation was presented. See part 3, infra.

served and the balance (one year) suspended for a period of five years, during which time the probationer would serve probation. The judge also sentenced the probationer to five years of probation on count 3, to be served concurrently with the probation sentence imposed in count 1.

Separately, on January 16, 2015, the probationer was sentenced in a case in the Superior Court in Worcester County (Worcester case) to a State prison term of from two and one-half years to two and one-half years and a day, to be served "forthwith and notwithstanding any sentence [that he is] now serving."

In April 2017, the probationer was served with a notice of alleged probation violation alleging that he had (1) recklessly endangered a child, (2) committed assault and battery on a family member, (3) failed to report to the probation office for a visit, and (4) distributed a class B controlled substance. The notice listed the probationer's rights, including a right to cross-examine witnesses against him, a right to present evidence, and a right to a hearing.

A surrender hearing was held on June 21, 2017. At the start of the hearing, the probationer, through counsel, indicated that he would stipulate to the violations and the probation department's proposed resolution. A probation officer then testified that two criminal complaints had entered in the

District Court against the probationer, one charging reckless endangerment of a child and domestic assault, and the other charging distribution of a class B substance. The probation officer outlined the recommendation requiring the probationer to serve the one-year suspended portion of his sentence on count 1 and that he be placed on probation for two years following the completion of that sentence. Finally, the probation officer described the recommended conditions of probation, including the entry of an abuse prevention order as to the mother of the probationer's child and the requirement that the probationer participate in a ten-month batterer's intervention program after his release from incarceration.

The judge then held the following colloquy with the probationer:

> The judge: "Mr. Santana, your lawyer tells me that you want to stipulate to these violations. Is that true?"
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> The probationer: "Yes."
>
> The judge: "Do you know what that means?"
>
> The probationer: "Yes."
>
> The judge: "What does it mean?"
>
> The probationer: "Waiving my rights."
>
> The judge: "You're waiving your rights because you have a right to a hearing and [the probation officer] would have to prove that you actually violated your probation by distributing Class B and by domestic assault and reckless endangerment. You're giving up that right to a hearing. Do you understand that?"

> The probationer: "Yes."
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> The judge: "Did you talk to [your attorney] about that decision?"
>
> The probationer: "I did."
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> . . .
>
> The judge: "Did she explain to you all the choices you have here?"
>
> The probationer: "She did."
>
> The judge: "Did you choose to waive your hearing?"
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> The probationer: "Yes."
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> The judge: "Nobody pressured you into it?"
>
> The probationer: "No."

During the colloquy, the probationer's attorney volunteered that she twice had visited him in jail to speak with him. The judge made a finding on the record that the probationer had violated the terms of his probation. She then imposed the remaining one-year suspended portion of the original sentence on count 1 and imposed a two-year term of probation on count 3, with the recommended conditions, to run from and after the committed portion of the sentence.

On July 6, 2017, the probationer filed a motion to revise and revoke his sentence. His counsel submitted an affidavit in which she averred that, at the time of the surrender hearing, she had been unaware that the sentence in the Worcester case was

a forthwith sentence. On September 22, 2017, at the hearing on the motion, counsel for the probationer argued that, under § 27, the forthwith sentence terminated both the committed and the probation portions of the sentence in this case. The judge denied the motion. On the following day, the probationer filed a notice of appeal from the denial of the motion to revise and revoke, purporting also to appeal from the "verdict" entered on June 21, 2017, after the surrender hearing. We transferred the appeal to this court on our own motion.

Discussion. On appeal the probationer argues that (1) the judge abused her discretion by failing to weigh the impact of the forthwith sentence in the Worcester case on the probationer's probation sentence, (2) his waiver of his right to an evidentiary probation violation hearing was not knowing and voluntary, (3) his right to due process was violated when the judge revoked his probation without any evidence of the alleged violations, and (4) the condition that he attend a batterer's intervention program is not reasonably related to the goals of sentencing and probation as to the underlying firearms convictions. The Commonwealth argues that § 27 does not apply to the probationer's sentence of probation and that the probationer's appeal from his sentence is not properly before us. We consider these arguments in turn, beginning with the appeal from the denial of the probationer's motion to revise and

revoke his sentence, which undisputedly is timely and which, if successful, would render the appeal from his sentence moot.

1. G. L. c. 279, § 27, and the effect of the forthwith sentence. The question whether a forthwith sentence under § 27 terminates a preexisting sentence of probation is a question of first impression.[3] We review matters of statutory interpretation de novo. See Commonwealth v. Moffat, 478 Mass. 292, 298 (2017), S.C., 486 Mass. 193 (2020). While the probationer argued at the hearing on his motion to revise and revoke his sentence that § 27, by its terms, meant that his probation sentence automatically was terminated by the forthwith sentence in the Worcester case, he argues on appeal only that the judge had the discretion to consider the impact of the Worcester sentence on his probation sentence and failed to do so.

These arguments are interrelated, and the result depends on our interpretation of § 27, which states:

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[3] Regarding the definition and effect of a forthwith sentence, we have stated that "the effect of such a sentence is that 'the sentence then being served in the jail or house of correction is terminated and the prisoner is discharged at the expiration of his [State prison] sentence'" (quotation omitted). Commonwealth v. Lydon, 477 Mass. 1013, 1015 (2017), quoting Dale v. Commissioner of Correction, 17 Mass. App. Ct. 247, 249 (1983). See Dale, supra at 248-249 ("A forthwith sentence may be defined as a sentence which is ordered by a judge to take effect immediately despite a previous sentence then being served by the prisoner"). See also 120 Code Mass. Regs. § 100 (2017) (parole board regulation's definition of "forthwith sentence" states, "Forthwith state prison sentences extinguish prior house of correction sentences").

> "If a convict serving a sentence of imprisonment in a jail or house of correction is convicted of a felony, the court may impose sentence of imprisonment in the state prison and order it to take effect forthwith, notwithstanding the former sentence. The convict shall thereupon be removed to the reception center established under [G. L. c. 127, § 20], and shall be discharged at the expiration of his sentence thereto."

The statute does not refer to sentences of probation, and instead by its plain terms applies only to sentences of imprisonment. Thus, § 27 does not apply to the probationer's sentence of probation. See Commonwealth v. Keefner, 461 Mass. 507, 512 (2012), quoting Commonwealth v. Russ R., 433 Mass. 515, 521 (2001) ("[A] statutory expression of one thing is an implied exclusion of other things omitted from the statute"). See also City Elec. Supply Co. v. Arch Ins. Co., 481 Mass. 784, 789 (2019) ("We do not read into the statute a provision which the Legislature did not see fit to put there" [citation omitted]); Commonwealth v. Ronald R., 450 Mass. 262, 266 (2007) (declining to read into statute procedure not expressed by its terms). Therefore, the argument that the forthwith sentence terminated or otherwise had an impact on the probationer's sentence of probation is without support, and the motion judge did not abuse her discretion. We thus affirm the denial of the probationer's motion to revise or revoke his sentence.

2. The probationer's waiver of his right to an evidentiary probation violation hearing. a. Propriety of appeal. Before

we consider the merits of the probationer's challenges to his probation sentence, we first must determine whether the issues are properly before us. The Commonwealth argues that they are not because the probationer never raised the issues in a motion for a new trial, see Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), and thus does not appeal from any adverse final order with respect to the sentence. Furthermore, the Commonwealth argues that because the probationer did not file a notice of appeal from the sentence of probation within thirty days, see Mass. R. A. P. 4 (b), as appearing in 481 Mass. 1606 (2019), the appeal from the sentence is untimely.[4]

"Under Mass. R. A. P. 4 (b), the [probationer] must file a notice of appeal within thirty days of the . . . imposition of sentence."[5] Commonwealth v. Cowie, 404 Mass. 119, 122 n.8 (1989). Thus, as it concerns the probationer's challenges to

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[4] The probationer did not file a reply brief and did not address in his principal brief the timeliness of his appeal from the sentence.

[5] The probationer's notice of appeal states that it is filed pursuant to Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 (2001), which allows motions for postconviction relief to be filed at "at any time." See Mass. R. Crim. P. 30 (a), (b). However, that rule pertains to motions filed in the trial court, not in the appellate courts. See Mass. R. Crim. P. 30 (c) (7) ("All motions under subdivisions [a] and [b] of this rule may be heard by the trial judge wherever the judge is then sitting"). As an appeal from a sentence, the probationer's case is subject instead to the thirty-day deadline imposed by Mass. R. A. P. 4 (b) (1).

his sentence of probation, the notice of appeal was untimely, and the issues that the probationer raises are not properly before us.[6]

Nevertheless, we exercise our discretion to address the issues raised because the arguments have been briefed fully by the parties, they raise significant questions concerning the conduct of surrender hearings, and addressing them is in the public interest. See Marcus v. Newton, 462 Mass. 148, 153 (2012). We apply the standard of review applicable to issues not properly preserved for appeal, determining whether an error occurred and, if so, whether it created a substantial risk of a miscarriage of justice. See Commonwealth v. Dorazio, 472 Mass. 535, 548 (2015), citing Commonwealth v. Jackson, 419 Mass. 716, 719 (1995).

b. Knowing and voluntary waiver. The probationer argues that his waiver of his right to an evidentiary probation violation hearing was not knowing and voluntary. While we never have addressed the question whether a stipulation to a violation

[6] Outside of the thirty-day deadline of Mass. R. A. P. 4 (b) (1), a probationer seeking to challenge the sentence imposed in consequence of an order revoking probation should file a motion under Mass. R. Crim. P. 30 (a) in the trial court. Commonwealth v. Christian, 429 Mass. 1022, 1023 (1999). On the other hand, a challenge to the procedural merits of the revocation itself should be brought by means of a motion for a new trial under Mass. R. Crim. P. 30 (b). See Commonwealth v. Sayyid, 86 Mass. App. Ct. 479, 486 n.7 (2014), citing Christian, supra.

of probation and a waiver of the right to a hearing must be made knowingly and voluntarily in order to be valid, the Appeals Court did so several years ago in Sayyid, 86 Mass. App. Ct. at 480. In Sayyid, the Appeals Court adopted the approach of the United States Court of Appeals for the First Circuit and held that "a defendant's agreement to waive a [probation violation] hearing -- such as by stipulating to violations -- must be knowing and voluntary and that such waiver can be assessed under the totality of the circumstances." Id. at 489. See United States v. Correa-Torres, 326 F.3d 18, 24 (1st Cir. 2003). Like the First Circuit, the Appeals Court also concluded that "no particular colloquy is constitutionally required at the time of the waiver." Sayyid, supra at 480, 488-489, citing Correa-Torres, supra at 23.

We agree with the Appeals Court's reasoning in Sayyid and today adopt its analysis and conclusion in full. To summarize, like most rights in our system of criminal justice, the right to a probation violation hearing may be waived. See Sayyid, 86 Mass. App. Ct. at 488, citing Correa-Torres, 326 F.3d at 22. Because this right and its waiver closely affect individual liberty, the waiver must be made knowingly and voluntarily in order to be effective. See Sayyid, supra, citing Correa-Torres, supra. Where a probationer later challenges the validity of such a waiver, a reviewing court should decide the question

based on the totality of the circumstances. See Sayyid, supra at 489, citing Correa-Torres, supra at 23.

Because revocation proceedings are less formal than criminal prosecutions, we do not prescribe any particular colloquy that the judge must undertake to determine whether the waiver is knowing and voluntary, and the absence of a colloquy is not fatal to determining that a waiver was valid.[7] See Sayyid, 86 Mass. App. Ct. at 489, citing Correa-Torres, 326 F.3d at 23. We caution, however, that a thorough colloquy is the most precise means of evaluating the voluntariness of a waiver, and that such a colloquy followed by an express finding of voluntariness by the judge will be of great use to a reviewing court in assessing the validity of a waiver. See Sayyid, supra, quoting Correa-Torres, supra ("While such an express finding is not ordinarily required in connection with a waiver of rights, it is infinitely more difficult to find a valid waiver based on a silent record"). In addition, we do not require that a stipulation to violations or a waiver of a hearing be in writing, but a judge is authorized to require it. See Commonwealth v. Johnson, 94 Mass. App. Ct. 24, 28 (2018) (applying Sayyid).

[7] As the Appeals Court noted, the Federal appellate courts uniformly have held that a colloquy is not absolutely required before a judge accepts a waiver. See Sayyid, 86 Mass. App. Ct. at 492-493 (citing cases).

Turning to the case before us, we conclude based on the totality of the circumstances that the probationer's stipulation to violations and his waiver of his right to a probation violation hearing were knowing and voluntary. While not required to do so, the judge held a colloquy in which the probationer acknowledged that he was stipulating to the violations and waiving his rights. The judge informed the probationer that he had a right to a hearing at which the probation officer would be required to prove that the probationer actually violated his probation by committing the charged offenses and asked whether the probationer understood that he was waiving that right, and the probationer responded in the affirmative. The judge also asked whether the probationer had consulted with counsel and whether counsel had explained the options available to him, and the probationer again responded in the affirmative. In response to the judge's questions, the probationer indicated that he chose to waive his right to a hearing and that no one had pressured him to do so.

In addition to the judge's direct colloquy with the probationer, the probationer's attorney stated that she had twice visited him in jail to speak with him. Furthermore, the notice with which the probationer was served and which notified him of the alleged violations listed his rights, including the right to an evidentiary hearing.

On the other hand, the deficiencies that the probationer identifies are not insignificant. The probation officer never recited the underlying facts of the alleged violations or the evidence in support of them. Accordingly, the judge could not question the probationer as to his agreement with the factual basis for the alleged violations. In addition, while the judge found that there was sufficient evidence of a violation, there was no express finding on the record that the probationer's waiver was knowing and voluntary. Cf. Johnson, 94 Mass. App. Ct. at 30-31 (commending judge for having "followed the preferred practice of conducting a colloquy with the [probationer] in which she fairly and meticulously secured the [probationer]'s agreement to the factual basis for each of the alleged violations prior to accepting his admission and his waiver of the right to a hearing").

The record before us supports the conclusion that the probationer's stipulation and waiver were knowing and voluntary, and his challenge to his sentence on this basis thus fails. However, we note that, while not constitutionally mandatory, the best practice for a judge at a surrender hearing in which a probationer stipulates to a violation of probation or waives his right to a probation violation hearing is for the judge to (1) require the probation officer to state the nature of the alleged violations, recite the factual basis for them, and summarize

either orally or in writing the evidence that would be presented against the probationer at a probation violation hearing; (2) ask the probationer whether he agrees with the factual allegations stated; (3) inform the probationer of his rights to a hearing, to cross-examine witnesses, and to present evidence; (4) question the probationer regarding his understanding of these rights, whether he has consulted with counsel regarding his decision to waive them, and whether he intends to stipulate to the alleged violation and to waive each right; and (5) make an explicit finding on the record that the probationer's stipulation and waiver are knowing and voluntary before finding sufficient evidence of a violation.[8]

3. Due process claim. The probationer argues that the finding of a probation violation must be vacated because no evidence of a violation was presented. The judge's finding was based on the probationer's stipulation and was proper because, as we have concluded, the stipulation was valid, as was the probationer's waiver of his right to have evidence presented. See part 2.b, supra. The probationer's argument conflates the requirements of due process for a probation violation hearing, which include the presentation of evidence, with the

[8] For a summary of a probationer's rights in probation revocation proceedings, which this recommendation is meant to address, see Commonwealth v. Wilcox, 446 Mass. 61, 66 (2006).

requirements for finding that such a hearing is validly waived, as here. See Sayyid, 86 Mass. App. Ct. at 487-489 (discussing due process requirements for probation violation hearing under Morrissey v. Brewer, 408 U.S. 471 [1972], and Commonwealth v. Durling, 407 Mass. 108 [1990], as distinct from requirements for valid stipulation of violation and waiver of hearing adopted from Correa-Torres, 326 F.3d 18). The probationer's challenge to his sentence of probation on this basis therefore fails as well.

4. Reasonableness of probation condition. The probationer argues that the condition that he attend a ten-month batterer's intervention program is not reasonably related to the underlying firearms offenses to which he pleaded guilty. In addition to the reasons already discussed, see part 2.a, supra, this argument is not preserved because the probationer made no objection to the proposed condition at the surrender hearing and, in fact, agreed to it, see Commonwealth v. Obi, 475 Mass. 541, 549 (2016) (defendant waived argument about condition of probation because she "raised no such concerns before the trial court judge, and there is no information in the record that would allow us to evaluate her claims"). This argument therefore would be waived even if the probationer's appeal from his sentence properly were before us. See id. However, because the appropriateness of probation conditions is important to the

administration of justice and because this case presents an opportunity to elucidate our case law, we exercise our discretion to reach the issue.

Just as a judge has discretion to set conditions of probation at the time of sentencing, see G. L. c. 276, § 87 (judge may impose "such conditions as [the judge] deems proper"); see also Commonwealth v. Lapointe, 435 Mass. 455, 459 (2001); Commonwealth v. Pike, 428 Mass. 393, 402 (1998), she also has the discretion to modify those conditions "as a proper regard for the welfare[] not only of the probationer but of the community[] may require" (citation omitted), Buckley v. Quincy Div. of the Dist. Court Dep't, 395 Mass. 815, 818-819 (1985). In either circumstance, a condition of probation is enforceable so long as it is reasonably related to the goals of sentencing and probation. See LaPointe, supra; Pike, supra; Commonwealth v. Power, 420 Mass. 410, 414-415 (1995), cert. denied, 516 U.S. 1042 (1996).

We recognize that several statements in Commonwealth v. Goodwin, 458 Mass. 11 (2010) (Goodwin II),[9] may have focused attention away from the general requirement that probation conditions always must be reasonably related to the goals of

[9] We adopt this label to clarify that our discussion in this does not pertain to our earlier, related decision in Commonwealth v. Goodwin, 414 Mass. 88 (1993), which is cited in many of the cases we discuss.

sentencing and probation. In that case, we stated: "Where a defendant has violated a condition of his probation, a judge's authority to modify or add conditions of probation is nearly unlimited should the judge decide not to imprison the defendant but to return him to probation." Id. at 17. We noted in a footnote that "[t]he only limitation is that, where a probation condition infringes on a defendant's constitutional rights, it must be 'reasonably related' to the goals of sentencing and probation." Id. at 17 n.8. Together these passages may have implied that, where a condition of probation does not infringe on a constitutional right, the "reasonably related" requirement does not apply. However, our frequent statement that "[a] probation condition is enforceable, even if it infringes on a defendant's ability to exercise constitutionally protected rights, so long as the condition is 'reasonably related' to the goals of sentencing and probation," LaPointe, 435 Mass. at 459, quoting Pike, 428 Mass. at 403; see Power, 420 Mass. at 414 (similar), has never meant that where such a right is not affected the condition need not be reasonably related to those goals. Cases decided after Goodwin II perhaps have stated the point more clearly. See Commonwealth v. Eldred, 480 Mass. 90, 96 (2018), quoting Obi, 475 Mass. at 547 ("[C]onditions are enforceable 'so long as the condition is "reasonably related" to the goals of sentencing and probation.' Even where a condition

of probation affects a constitutional right, it is valid if it is 'reasonably related' to the goals of sentencing and probation . . ."). In addition, in Goodwin II, we stated that, where a probationer has violated a condition of his probation and the judge adds or modifies the conditions as a result, "the [probationer] is essentially being sentenced anew on his underlying conviction, and the judge may impose any conditions of probation that could have been imposed at his original sentencing." Goodwin II, 458 Mass. at 17. We now recognize this statement of the law as incomplete because it implies that, where a violation has occurred, the judge is limited to imposing conditions that could have been imposed at the original sentencing.[10] As we went on to explain, even where the

[10] We note that the cases cited in Goodwin II, 458 Mass. at 17, for this proposition addressed circumstances different from those presented in Goodwin II itself, which addressed a judge's alteration of the conditions of probation where the probationer had not committed a violation. Contrast Commonwealth v. Cory, 454 Mass. 559, 564 (2009) (in deciding whether G. L. c. 265, § 47, requiring global positioning system monitoring, was impermissible ex post facto law, stating that "[p]enalties for violation of the terms of supervised release, including the penalty of additional supervised release, are attributed to the original conviction rather than to the violation"); Wilcox, 446 Mass. at 65 (stating, in context of explaining why probation revocation proceedings are not treated as criminal trials, that "[t]he probation revocation proceeding is not a new criminal prosecution . . . . The Commonwealth has already met its burden of proving beyond a reasonable doubt the person's guilt on the underlying crime").

probationer has not violated the terms of his probation, "[a] judge may add or modify a probation condition that will increase the scope of the original probation conditions . . . where there has been a 'material change in the probationer's circumstances since the time that the terms of probation were initially imposed.'" Id. at 18, quoting Buckley, 395 Mass. at 820. We noted the additional limiting principle that such a modification may not be "so punitive as to significantly increase the severity of the original probation." Goodwin II, supra, citing Buckley, supra at 818 n.5, 820. Thus, if it were true that, where the probationer had violated the conditions of his probation, the judge could impose only those conditions that could have been imposed at the original sentencing, the bar for modifying probation conditions in cases of a violation would be higher than that in cases where no violation had occurred, because in the latter case additional conditions may be imposed upon a mere showing of changed circumstances. See Goodwin II, supra.

Thus, today we wish to restate two points. First, in order to be enforceable, a condition of probation must be reasonably related to the goals of sentencing and probation, regardless of whether a constitutional right is affected. Second, where a probationer who is serving a suspended sentence and a sentence of probation has violated a condition of his probation, a judge

considering the modification or addition of probation terms as an alternative to imprisonment may consider the conduct constituting the violation in modifying the conditions of probation or crafting new ones.[11] Nevertheless, the modified or additional conditions may not be so punitive as to significantly increase the severity of the original probation.

After considering the challenged condition according to these principles, we conclude that there was no error. The judge had before her the probationer's prior convictions on firearms offenses and his stipulation, equivalent to proof by a preponderance of the evidence, see Commonwealth v. Wilcox, 446 Mass. 61, 65 (2006) (probation violation must be proved by preponderance of evidence rather than proof beyond reasonable doubt), that he committed domestic assault and recklessly

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[11] This principle is consistent with our approach to probation conditions generally. For example, in Commonwealth v. Eldred, 480 Mass. 90, 95-97 (2018), we held that, where the probationer had pleaded guilty to larceny and admitted that her addiction motivated her to commit the crime, it was appropriate for the judge to impose special conditions of probation requiring the probationer to remain drug free, to continue outpatient drug treatment, and to submit to random drug screens. We noted that the conditions were not a punishment for her drug use, but for the underlying crime of larceny. Id. at 98. Nevertheless, the judge could consider the probationer's drug use in tailoring the conditions to the probationer's personal circumstances. Id. at 97. Upon the violation of a condition of probation, a probationer is not being separately punished for any uncharged conduct constituting the violation, but the conduct properly may be considered in the modification or addition of probation conditions as part of the task of tailoring the conditions to the probationer's circumstances.

endangered a child. The judge reasonably could have concluded, based on these facts and on the generally acknowledged relationship between access to firearms and domestic violence,[12] that the probationer's participation in a batterer's intervention program was necessary to his rehabilitation and the protection of the public. See Buckley, 395 Mass. at 817. In addition, the new condition, to which the probationer at any rate agreed, is not so burdensome as to significantly increase the severity of the original probation. The judge acted well within her broad discretion.

Conclusion. The probationer's appeal from his sentence of probation entered on June 21, 2017, is dismissed as untimely. The order denying the probationer's motion to revise and revoke his sentence, entered September 25, 2017, is affirmed.

So ordered.

[12] See Everytown for Gun Safety, Guns and Violence Against Women: America's Uniquely Lethal Intimate Partner Violence Problem, at 7, 10, 15 (Oct. 2019), https://everytownresearch.org/wp-content/uploads/sites/4/2019/10/IPV-for-WEB-042921A-1.pdf [https://perma.cc/4HPJ-TGLW] (describing role that firearms play in power dynamic of abusive relationships, increased likelihood that abusive partners with access to firearms will kill female victims, and risk that children in abusive homes either will be injured or suffer long-term emotional and psychological trauma from witnessing death of parent).